

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 14, 2006

STATE OF TENNESSEE v. JAMES DEWAYNE BASS

Appeal from the Circuit Court for Williamson County
No. II-CR02066 R.E. Lee Davies, Judge

No. M2005-01471-CCA-R3-CD - Filed May 12, 2006

The defendant, James Dewayne Bass, is aggrieved that the Williamson County Circuit Court ordered him to serve his guilty-pleaded, three-year, Department of Correction sentence consecutively to “all outstanding sentences,” and he appeals that ruling. We hold that evidence of the defendant’s extensive criminal activity and of his re-offending while on probation supports the consecutive sentencing determination, although the record fails to justify consecutive sentencing via a finding of professional criminality. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

John H. Henderson, District Public Defender; and Gene Honea, Assistant District Public Defender, for the Appellant, James Dewayne Bass.

Paul G. Summers, Attorney General & Reporter; Brian Clay Johnson, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In the defendant’s guilty plea submission hearing, the prosecutor described the factual basis for the defendant’s plea to, and conviction of, identity theft. *See* Tenn. Code Ann. § 39-14-150 (Supp. 2005). The prosecutor stated that, as a means of evading an impending garnishment on his wages, the defendant, an employee of Beacon Point Retirement Center, attempted to obtain a new identity card and payroll status from Beacon Point by announcing that he was not James D. Bass, supporting the claim by presenting a driver’s license and social security card bearing the name “Timothy Battles.” The driver’s license bore the defendant’s picture but the name of Mr. Battles, who, according to the presentence report, was a friend of the defendant’s.

The presentence report showed that the 27-year-old defendant had been convicted of felony identity theft in Giles County in 2003 and of 17 counts of felony identity theft in Marshall County in 2001. He was also convicted of forgery in Marshall County in 2000. In addition, he was convicted in 1999 of passing worthless checks in Maury County and of four counts of passing worthless checks in Maury and Marshall Counties in 1998. He was convicted in 1997 of two counts of attempted forgery and of vandalism. Apparently his prodigious adult crime spree began with a conviction of shoplifting in 1995, when the defendant was 18 years old.

In the sentencing hearing, the presentence investigator testified that, prior to his conviction in the present case, the defendant had yet to serve 12 years on an aggregation of previous sentences and that he had a history of violating probation requirements. The investigator testified that the defendant had been “accidentally released” by the Department of Correction on his prior sentences and was on this release status, as well as on probation in Giles County, when he committed the offense in the present case. The defendant introduced his mental health report evincing a history of psychological and emotional problems.

Following the hearing, the trial court determined that, based upon the defendant’s extensive history of crimes involving fraud or theft, his record of criminal activity was extensive and that he was a professional criminal. It also concluded that the defendant committed the offense in the present case while on probation. The trial judge remarked that, during the defendant’s adult life, he “had spent [his] time . . . either . . . in jail or on probation or committing criminal acts.” As a result of its findings, the trial court ordered the three-year sentence in the present case to be served consecutively with the defendant’s previously amassed sentences.

On appeal, the defendant claims that the record contains no evidentiary support for the trial court’s conclusion that he was a professional criminal. The state posits that consecutive sentencing is supported, not only by the finding of professional criminality, but also by the mere extensiveness of the defendant’s record and by his commission of the offense while on probation.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. *See* Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

A determination to impose some sentences to run consecutively to other sentences must be predicated upon the finding of at least one basis specified in Tennessee Code Annotated section 40-35-115(b), which authorizes consecutive sentencing when:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7) (2003); *see id.* § 40-35-115(b) (providing that preponderance-of-the-evidence standard applies to establishing statutory grounds for consecutive sentencing).

In the present case, the trial court relied upon factors (1) (professional criminality), (2) (extensive criminality), and (6) (re-offending while on probation). In his brief, the defendant disputes only the "professional criminal" finding, citing a lack of evidence to support the finding.

A defendant's record of steady, gainful employment often militates against a finding of a professional criminal status. *See, e.g., State v. Linda Culver*, No. 01C01-9503-CC-00057, slip op. at 3 (Tenn. Crim. App., Nashville, Nov. 30, 1995) (rejecting finding of professional criminal status when defendant was steadily employed from 1976 to the date of sentencing, the conviction offenses resulted from eight drug sales during a four-month period, and the record failed to support the trial judge's characterization of the defendant's business as a "den of iniquity"). *But see, e.g., State v. Allen Prentice Blye*, No. E2001-01375-CCA-R3-CD, slip op. at 13 (Tenn. Crim. App., Knoxville, Nov. 1, 2002) ("[T]he defendant's sparse employment history coupled with the sheer number of his prior convictions supports a determination that he is indeed a professional criminal."),

aff'd on other grounds, 130 S.W.3d 776 (Tenn. 2004); *State v. Kenneth Paul Dykas*, No. M2000-01665-CCA-R3-CD, slip op. at 15-16 (Tenn. Crim. App., Nashville, Mar. 5, 2002) (affirming use of professional criminal status when “the defendant is a transient moving from place to place and is never employed for any period of time”); *State v. Terry L. Bowen*, No. 01C01-9303-CC-00076, slip op. at 17-18 (Tenn. Crim. App., Nashville, Mar. 29, 1994) (holding that evidence supported professional criminal status for defendant who had only worked 22 months during preceding eight years). This court has said, however,

[W]e glean no per se rule that the professional criminal factor can only apply when the defendant has essentially no means of support other than his criminal industry. Rather, the appellate court is often constrained to jettison the factor merely because the state failed to *prove* that criminal activities accounted for a major source of the defendant’s livelihood.

State v. Clifford Leon Farra, No. E2001-02235-CCA-R3-CD, slip op. at 19 (Tenn. Crim. App., Knoxville, Dec. 10, 2003) (emphasis in original), *perm. app. denied* (Tenn. 2004). For instance, in *State v. Harold Wayne Shaw*, No. M1999-01119-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Nashville, Oct. 27, 2000), the state’s claim that the defendant was a “major drug dealer” was not supported by the mere proof that he “had made two (2) or three (3) drug deals about six (6) months before the [crime].” *Id.*, slip op. at 8. That said, it remains true that factor (1) is implicated when the defendant’s criminal acts provide a major source of livelihood and not just when criminal activity provides the only, or even the major, source of livelihood. *Clifford Leon Farra*, slip op. at 19.

In the present case, the presentence report established that, during his adult life, the defendant was employed for only five months in 1999-2000 and for only three weeks in 2001. We note, as did the trial court, that some of the employment gaps during this period could be attributed to incarceration, and we note that prior to his arrest in the present case, he had been employed by Beacon Point for 18 months. The presentence report also revealed that the defendant began receiving \$380 per month in Supplemental Security Income in January 2001. More importantly, neither the presentence report nor any other evidence presented by the state showed the monetary amounts of the defendant’s numerous adjudicated thefts and related crimes. The record showed that the present offense was committed to avoid a garnishment and not directly as a means of providing a livelihood. On balance, we conclude that the record does not support a finding that the defendant was a professional criminal.

Nevertheless, the record supports the use of factors (2) and (6). The defendant’s record of criminal activity is indeed extensive, and testimony supported the trial court’s finding that the offense in the present case was committed while the defendant was on probation in Giles County. Furthermore, we conclude that the extended effective sentence is “justly deserved in relation to the seriousness of the offense[s],” *see* Tenn. Code Ann. § 40-35-102(1) (2003), and is “no greater than that deserved for the offense[s] committed,” *id.* § 40-35-103(2).

For these reasons, the judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE